# ARKANSAS SUPREME COURT

No. CR 06-526

NOT DESIGNATED FOR PUBLICATION

BOBBY SAVAGE
A/K/A BOBBY WAYNE SAVAGE
Appellant

v.

STATE OF ARKANSAS
Appellee

**Opinion Delivered** **February 22, 2007**

*PRO SE* APPEAL FROM THE CIRCUIT COURT OF BENTON COUNTY, CR 2003-1168, HON. DAVID S. CLINGER, JUDGE

REVERSED AND REMANDED.

**PER CURIAM**

In 2005, Bobby Savage, also known as Bobby Wayne Savage, entered a plea of guilty to first-degree sexual assault and aggravated assault on an employee of a correctional facility, and was sentenced to an aggregate term of 312 months' imprisonment. Subsequently, appellant timely filed in the trial court a petition for postconviction relief pursuant to Ark. R. Civ. P. 37.1. The trial court denied the petition without a hearing, and appellant has lodged an appeal here from the order.

On appeal, appellant maintains that trial counsel rendered ineffective assistance. We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there was evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

Here, appellant was initially charged with rape, a Y felony. As part of his plea bargain, this

charge was reduced to first-degree sexual assault and appellant agreed to enter the RSVP program for sex offenders while incarcerated. He agreed to a sentence of 240 months' imprisonment on the charge.[1] The gravamen of appellant's petition is that he accepted this plea bargain based on trial counsel's assurances that he would be required to serve only 25% of the sentence before becoming eligible for parole. However, appellant later discovered that he was required to serve 100% of the first-degree sexual-assault sentence pursuant to Act 1805 of 2001[2] due to a prior felony conviction. Thus, appellant contends, as trial counsel failed to apprise him of the effect of Act 1805, he entered into a plea of guilty that was not knowing, voluntary or intelligent. In his prayer for relief, appellant asks that his sentence for this charge be reduced from twenty years to five years, which would reflect the amount of time he expected to serve.

The trial court's order found that appellant voluntarily entered the plea of guilty and did so intelligently and with competent advice from trial counsel. The trial court further stated that appellant understood that he might not be granted parole at all, as it is a privilege and not a right. Further, the issue raised by appellant was conclusory in nature and could not support grounds for relief pursuant to Ark. R. Crim. P. 37.1.

To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's

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[1]Appellant does not contest the sentence he received on the second charge, aggravated assault on an employee of a correctional facility.

[2] Act 1805 of 2001 is codified at Ark. Code Ann. §6-93-609 ( Repl. 2006). This statute states, in pertinent part:

> (b)(1) Any person who commits a violent felony offense or any felony sex offense subsequent to August 13, 2001, and who has previously been found guilty of or pleaded guilty or nolo contendere to any violent felony offense or any felony sex offense shall not be eligible for release on parole by the board.

representation fell below an objective standard of reasonableness and that but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (*per curiam*). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State,* 342 Ark. 35, 26 S.W.3d 123 (2000). To rebut this presumption, appellant must show that there is a reasonable probability that the decision reached would have been different absent the errors. *Greene, supra*. A reasonable probability is one that is sufficient to undermine confidence in the outcome of the trial. *Id.*

The burden is on appellant to provide facts to support his claims of prejudice. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (*per curiam*). Allegations without factual substantiation are insufficient to overcome the presumption that counsel was effective. *Id.* Conclusory statements cannot be the basis of postconviction relief. *Jackson v. State,* 352 Ark. 359, 105 S.W.3d 352 (2003). Where a case involves an allegation of ineffectiveness in relation to a guilty plea, the appropriate standard of prejudice is whether, but for counsel's errors, there is a reasonable probability that the defendant would not have entered a guilty plea and thereby waived his right to a trial. *Jones v. State*, 355 Ark. 316, 136 S.W.3d 774 (2003).

In a specific exchange during the plea hearing, the judge, the prosecutor, trial counsel and appellant all agreed that appellant would have to serve no more than five years of the twenty-year sentence:

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| THE COURT: | [A]pparently, they have reached an agreement, and I need to find out from you are you in agreement with the recommendation they've worked out? |
| APPELLANT: | Yes, sir. |
| THE COURT: | [U]nder the agreement they would reduce the Rape charge to a Sexual |

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| | Assault First-degree, an A felony. And let me ask this, of course, Rape is a 70-percent case. Is the Sexual Assault a 70-percent case? |
| PROSECUTOR: | No, sir, a quarter time case. |
| THE COURT: | Quarter time. Is that your understanding? |
| TRIAL COUNSEL: | It is, Your Honor. That's how I have advised Mr. Savage. |
| APPELLANT: | Yes, sir. |

During a second exchange, the trial court expressed to appellant that he would have an advantage in taking the plea agreement:

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| THE COURT: | Mr. Savage, do you have any questions about the recommendation[s] that have been stated into the record or anything that has been said by either of these attorneys? |
| APPELLANT: | No, sir. I fully understand and agree to . . . the plea. |
| THE COURT: | Well, Mr. Savage, . . . it seems like these cases have been around forever, and as a result of it, I am familiar with the case and familiar with the allegations. I recognize that the attorneys have struggled, both sides have pluses and minuses to their case. And as a result, I think that probably this result is . . . compromise. *One thing – one clearcut advantage for you and that is it gets you away from that 70 percent rule, and that certainly was a possibility.* |
| APPELLANT: | Yes, sir. |
| THE COURT: | If the State has been able to prove everything, all their elements on the Rape charge, you faced a much longer time in the Department of Corrections. I am going to accept the recommendation, and . . . based on everything that I have heard. I will grant the State's motion to reduce the Rape, Y felony, and that leaves that charge and the Aggravated Assault charge. How do you plead to these two charges? |
| APPELLANT: | Guilty. |

(Emphasis supplied.)

During the hearing, appellant stated that he fully understood the punishment range available to a jury should the matter have gone to trial on the rape charge. However, contrary to the trial court's findings, other than the two instances noted above, the issue of parole eligibility was not discussed at the hearing.

As another condition of the plea agreement, appellant consented to complete the RSVP

program while at the Department of Correction. This was noted on the judgment and commitment order, and discussed during the hearing. Trial counsel informed the judge that appellant was ready to address his personal issues and move on with his life, as he had previously spent time in prison. Appellant had already made contact with the program personnel prior to entering the plea of guilty.

In this matter, the totality of the circumstances indicate that, but for counsel's errors, a reasonable probability exists that appellant would not have entered into the guilty plea on the charge of first-degree sexual assault or waived his right to trial. We cannot say that serving only 25% of the twenty-year sentence was not part of the inducement for appellant to enter into a plea of guilty. Thus, although there was evidence to support the trial court's findings, we are left with the definite and firm conviction that a mistake was committed.

Where a guilty plea is entered, the plea proceeding is the defendant's trial. *Padilla v. State,* 279 Ark. 100, 648 S.W.2d 797 (1993). We reverse and remand to vacate the judgment as to the first-degree sexual assault charge for retrial. The two remaining points on appeal need not be addressed as we reverse on the first point on appeal.

Reversed and remanded.